

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zhao v. Ai Kang Capital Inc.*,  
2024 BCSC 2276

Date: 20241216  
Docket: S1812177  
Registry: Vancouver

Between:

**Qun Zhao and AQM Investment International Ltd.**

Plaintiffs

And

**Ai Kang Capital Inc., Wang Dong,  
Aikang Yi Yuan Enterprises Ltd. and Chen Changzhan**

Defendants

And

**A2Z Capital Inc., TDR International Trading Ltd.,  
Ren Fen Zhang, 1113767 B.C. Ltd., and  
Kang Qing Zhang**

Defendants by Counterclaim

Before: The Honourable Justice Masuhara

## Rulings

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Place and Date of Trial:

Vancouver, B.C.  
October 7–8, 21–22, 24, and  
28–30, 2024

Place and Date of Judgment:

Vancouver, B.C.  
December 16, 2024

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**INTRODUCTION**

[1] This decision concerns multiple applications brought by parties to this proceeding, all of which were heard before me over an eight-day period beginning at the start of the trial on October 7. Arguments carried over to October 8, then adjourned and continued October 21 through October 30. The materials placed before me were voluminous. The trial had been set for 40 days. The trial time allotted has been significantly eaten up by the present applications. All counsel recognized that the dates scheduled for this trial were imperilled. The mountain of detailed materials requiring review has assured this outcome.

[2] The applications concern document disclosure, striking of pleadings, cross-examination of deponents on their affidavits, and matters related to pleadings. A declaration that privilege was waived by the defendant, Dr. Wang, is also sought by the plaintiffs.

[3] The plaintiffs in this matter are AQM Investment International Ltd. (“AQM”) and Qun Zhao. Ms. Zhao was previously the CEO of one of the defendant companies, Ai Kang Capital Inc. (“AKC”). Alongside AKC, Ms. Zhao has also named Wang Dong, Aikang Yi Yuan Enterprises Ltd. (“AKYE”), and Chen Changzhan as defendants in this action.

[4] Dr. Wang was a director of AKC during the relevant period. He is also a director of AKYE, a company that is a 50% shareholder in AKC. In this ruling, I will refer to Dr. Wang and AKYE as the “Wang Defendants”. Chen Changzhan is a 10% shareholder in AKC and at the relevant times was a director of AKC.

[5] The within action seeks relief from oppression or unfairly prejudicial conduct relating to the management of AKC by the defendant Dr. Wang and his company AKYE. The plaintiffs seek orders that the defendants purchase the plaintiffs’ shares at fair market value; or, alternatively, that AKC be liquidated and dissolved and the assets of AKC be distributed to the shareholders in accordance with their shareholdings.

[6] The business that the principals were involved in was the development of real estate projects in the Lower Mainland.

[7] The defendants' counterclaim has named A2Z Capital Inc. ("A2Z"), TDR International Trading Ltd. ("TDR"), Ren Fen Zhang, 1113767 B.C. Ltd., and Kang Qing Zhang as defendants by counterclaim. The counterclaims are grounded on breach of fiduciary duty and breach of contract by Ms. Zhao in relation to her duties while employed by AKC.

[8] This action is not the only proceeding involving Dr. Wang and Ms. Zhao. There are several which are identified later in this ruling.

### **APPLICATIONS**

[9] I now set out the applications brought before me.

#### **Plaintiffs' Applications**

[10] In a Notice of Application dated October 10, 2024, the plaintiffs request the following orders against the defendant, AKC, under Rule 22-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009:

- a) An order striking the response, and any amended response, to civil claim for:
  - 1) failure to produce an amended list of documents, pursuant to a consent order executed on or about August 20, 2024, relating to a Notice of Application dated July 4, 2024;
  - 2) failure to produce an amended list of documents, pursuant to a consent order executed on or about August 20, 2024, relating to a Notice of Application dated August 12, 2024; and
  - 3) failure to comply with an order of Master Robinson dated September 26, 2024.

- b) An order striking the counterclaim, and any amended counterclaim, for:
  - 1) failure to produce an amended list of documents, pursuant to a consent order executed on or about August 20, 2024, relating to a Notice of Application dated July 4, 2024;
  - 2) failure to produce an amended list of documents, pursuant to a consent order executed on or about August 20, 2024, relating to a Notice of Application dated August 12, 2024; and
  - 3) failure to comply with an order of Master Robinson dated September 26, 2024, which also concerned an amended list of documents from AKC.
- c) An order that the proceeding continue as if no response to civil claim had been filed and as if no counterclaim had been filed.

[11] The plaintiffs also request the following orders in their October 10, 2024 Notice of Application as against the Wang Defendants under Rule 22-7:

- a) An order striking the amended response to civil claim for:
  - 1) failure to produce an amended list of documents, pursuant to a consent order executed on or about August 20, 2024, relating to a Notice of Application dated July 4, 2024;
  - 2) failure to produce an amended list of documents, pursuant to a consent order executed on or about August 20, 2024, relating to a Notice of Application dated August 12, 2024; and
  - 3) failure to comply with an order of Master Robinson dated September 26, 2024.
- b) An order that the proceeding continue as if no amended response to civil claim had been filed.

[12] In a subsequent Notice of Application dated October 15, 2024, the plaintiffs request the following:

- a) An order that Dr. Wang be cross-examined on his sixth affidavit dated October 3, 2024, pursuant to Rules 22-1 and 22-7, and the inherent jurisdiction of this Court.
- b) An order that Scott Sheng be cross-examined on his first affidavit dated October 3, 2024, pursuant to Rules 22-1 and 22-7, and the inherent jurisdiction of this Court.
- c) A declaration that in Dr. Wang's sixth affidavit dated October 3, 2024, Dr. Wang waived privilege over instructions to and legal advice from his lawyers for the period of June 2020 to June 22, 2022, relating to document production and disclosure of Dr. Wang, AKYE, and AKC.

[13] The plaintiffs also request special costs against the defendants, AKC and Dr. Wang, assessed from September 4, 2024, to date.

**Defendant Ai Kang Capital Inc. Applications**

[14] The defendant, AKC, in a Notice of Application dated October 15, 2024, requests the following:

- a) An order granting leave to file an amended counterclaim and amended response to civil claim.
- b) An order that the plaintiffs and the defendant by way of counterclaim, A2Z, amend their list of documents to include various unidentified documents.
- c) An order that the plaintiff, Ms. Zhao, provide an affidavit verifying the plaintiffs' and A2Z's list of documents.
- d) An order for the continuation of the examination for discovery of the plaintiff, Ms. Zhao, in her own capacity and as a representative of AQM and A2Z.

[15] In a Notice of Application dated October 18, 2024, AKC requests the following:

- a) An order under R. 22-1 that the plaintiff, Ms. Zhao, attend for cross-examination on her third affidavit dated October 11, 2024, and that the scope of this cross-examination include various exhibits of other affiants;
- b) An order that the cross-examination of Ms. Zhao be conducted before the court on the hearing of an application brought by AKC; or, in the alternative, before a court reporter in Vancouver, BC;
- c) An order that Ms. Zhao provide copies of emails referred to in her third affidavit at least 24 hours before her cross-examination; and should there be any non-English writing within these emails, those such emails be provided a week in advance; and
- d) Costs.

**SOME BACKGROUND FACTS**

[16] The following is a condensed chronology of events relevant to the Notices of Application before me:

- On or about January 1, 2016, Qun Zhao, Dr. Wang, and Chen Changzhan entered into a joint venture agreement (the “JVA”) setting up AKC. Under the terms of the JVA, Ms. Zhao was to act as the CEO of AKC.
- On April 6, 2018, Ms. Zhao was fired as CEO of AKC. By agreement of AKC’s legal counsel, Victor Tsao, and Ms. Zhao’s counsel, Robert Cooper, it was decided that Mr. Cooper would “hold, preserve, and not read or access” a laptop used by Ms. Zhao for AKC business.
- On June 18, 2018, Ms. Zhao and AQM filed a petition for relief from oppression, which then was converted to an action on November 9, 2018.



- On November 30, 2018, the defendant AKC filed a response to civil claim and a counterclaim. The defendants Dr. Wang, Mr. Chen, and AKYE also filed their responses to civil claim.
- On April 2, 2019, the defendants Dr. Wang, Mr. Chen, and AKYE provided their first list of documents.
- On April 24, 2019, the defendants Dr. Wang, Mr. Chen, and AKYE provided an amended list of documents.
- On May 1, 2019, the plaintiffs, and the defendants by counterclaim, provided their list of documents.
- On September 13, 2019, the defendants Dr. Wang, Mr. Chen, and AKYE provided their 2nd amended list of documents.
- On September 18, 2019, the plaintiffs, and the defendants by counterclaim, provided their amended list of documents.
- On September 24, 2019 the examination for discovery of Ms. Zhao personally and on behalf of AQM was conducted. She deposed that from 2016 onwards, she had not received any other income than the ones she received from AKC and A2Z. She also gave evidence that AQM was a holding company that did not engage in any business, except historically had provided consulting services for acquisition of companies.
- On September 26, 2019, the examination for discovery of the defendant, Dr. Wang, is conducted.
- On October 3, 2019, the defendants Dr. Wang, Mr. Chen, and AKYE provided their 3rd amended list of documents.
- On December 20, 2019, the defendants Dr. Wang, Mr. Chen, and AKYE provided their 4th amended list of documents.

- On December 23, 2019, the defendants Dr. Wang, Mr. Chen, and AKYE provided their 5th amended list of documents.
- On January 14, 2020, the plaintiffs, and the defendants by counterclaim, provided their 2nd amended list of documents.
- On January 21, 2020, AKC filed an application seeking an order that the plaintiffs provide certain materials and documents, including a laptop. This application was adjourned.
- On January 29, 2020, the plaintiffs, and the defendants by counterclaim, provided their 3rd amended list of documents.
- On February 5, 2020, the plaintiffs filed an application seeking orders for document disclosure. This application was adjourned.
- On March 25, 2021, AKC filed an application seeking an order that the plaintiffs provide certain materials and documents, including a laptop in Ms. Zhao's possession to a third party to review for privilege and to list the contents of the laptop.
- On April 7, 2021, AKC provided their list of documents. They also filed a response to the plaintiffs' February 5, 2020 application, which is adjourned several times over the year of 2021.
- On April 29, 2021, materials including a laptop are delivered to counsel for AKC.
- On May 6, 2021, the plaintiffs, and the defendants by counterclaim, provided their 4th amended list of documents.
- On July 21, 2021, the applications concerning document disclosure are heard, but relief concerning the laptop is not pursued due to its delivery to AKC's counsel on April 29, 2021.

- On October 7, 2022, an amended notice of civil claim is filed, with leave granted September 29, 2022.
- On October 19, 2022, the plaintiffs, and the defendants by counterclaim, provided their 5th amended list of documents.
- On October 25, 2022, the plaintiffs send letters to AKC, and AKYE and Dr. Wang requesting production of documents relating to the amended notice of civil claim.
- On January 27 and February 1, 2023, the plaintiffs made follow-up requests to the defendants regarding their October 25, 2022 demand.
- Between May and July, 2024, a review of the laptop revealed the existence of 86,000 documents.
- On July 5, 2024, counsel for the Wang Defendants encountered documents which might be privileged for Ms. Zhao. As a result, the review was suspended until the reviewers could ensure no inadvertent breach of privilege. Counsel for the Wang Defendants contacted plaintiff's counsel to discuss but were advised that counsel was unavailable. Despite follow ups, plaintiff's counsel did not provide responsive answers to their proposed solutions.
- On July 4, 2024, the plaintiffs filed a Notice of Application for document production. The hearing is set for August 21, 2024.
- On August 12, 2024, the plaintiffs filed another Notice of Application for document production. The hearing is also set for August 21, 2024.
- On August 20, 2024, counsel for AKC, and for Dr. Wang and AKYE, consented to produce all documents requested under the July 4 and August 12, 2024 Notices of Application (other than certain legal invoices) on or before

September 4, 2024. The plaintiffs document production applications are re-set for August 28, 2024, to deal with production of the legal invoices.

- The substantive terms of the Consent Orders are the same and read as follows:
  1. The defendant, Ai Kang Capital Inc., by on or before September 4, 2024, shall prepare and serve an amended list of documents which shall include the categories of documents set out in Schedule “A” appended to this Order, and deliver electronic copies of all new documents;
  2. The defendants, Aikang Yi Yuan Enterprises Ltd. and Wang Dong, by on or before September 4, 2024, shall prepare and serve and amended list of documents set out in Schedule “B” appended to this Order, and deliver electronic copies of all new documents; and
  3. Costs of this application in the cause.
  
- On September 3, 2024, the plaintiffs’ application for production of the legal invoices is denied by Associate Judge Muir.
  
- On September 4, 2024, the defendants Dr. Wang and AKYE provided their 7th amended list of documents. Due to misnumbering, there was no 6th amended list of documents. The defendant, AKC, also provided their amended list of documents. Dr. Wang deposed that he anticipated filing a 9th further amended list of documents as a result of the plaintiff’s demand for the files of an expert retained for the litigation, and documents identified as producible as a result of new keyword searches executed in September.
  
- On September 5, 2024, 32,647 emails were discovered by AKC’s counsel for an email address previously identified by Dr. Wang at his examination for discovery on September 26, 2019, aikangwongdong@126.com. At Dr. Wang’s discovery in September 2019, he stated that this email address was the address that he always used and that he seldom used any other account. In the October 15, 2024 Notice of Application brought by the plaintiffs, as part of their factual basis, the plaintiffs say the following:
  39. On an examination for discovery on September 26, 2019, Wang Dong’s evidence was that he had searched his email account

aikangwangdong@126.com for all emails relevant to the litigation and provided those to his counsel. Wang Dong was asked as an information request to search all his email accounts including aikangwangdong@126.com as well as the emails accounts of his secretary or assistants and to produce any relevant emails. Subsequent correspondence from Wang Dong's counsel John Shields in December 2019, presumably on the basis of Wang Dong's instructions and advice, stated that no emails relevant to the litigation existed at the aikangwangdong@126.com email address or at any other email addresses.

40. The plaintiffs subsequently brought an application for production of documents, including from Mr. Wang's email account aikangwangdong@126.com and other email accounts, and for an affidavit of documents from Mr. Wang. That application was initially set down for bearing on March 23, 2021 and was eventually heard July 21, 2021. At the time Ascension Law was counsel for Wang Dong and AKYE and took the position that no affidavit of documents was required from Wang Dong and that all relevant documents had been produced by the defendants.

AKC's counsel advised the parties of the additional documents and that Triage Data Solutions was in the process of securing the emails.

- On September 11, 2024, Mr. Muirhead advised that of the emails discovered, approximately 2,247 were relevant and would be produced. The next day, Mr. Muirhead advised that his review of the emails would be completed by September 18, 2024.
- On September 19, 2024, the Wang Defendants provided their 8th amended list of documents.
- On September 23, 2024, the defendant AKC provided their 2nd amended list of documents.
- On September 26, 2024, Associate Judge Robinson granted the plaintiffs' application that Dr. Wang, AKYE, and AKC produce affidavits verifying their lists of documents, and to provide a breakdown of documents produced. The terms of the order are summarized as:
  - 1) Notice of application filed September 13, 2024, (CEIS #189), Paragraph 1, 2(a), 4, 5(a), and 5(c) are adjourned generally.

- 2) The defendant, AKC, provide an amended list of documents that includes a heading or a category which demonstrates the extent to which the documents disclosed comply with the consent order that the parties entered into with respect to disclosure. This must be provided on or before 4:00 pm, October 3, 2024.
- 3) Both the Wang Defendants and AKC are required to provide affidavits verifying the respective list of documents, and those affidavits verifying the list of documents shall set out the efforts made by each of them to comply with the rules of the court requiring document production, and specifically, efforts made with respect to complying with the consent order, including the searches which were conducted, the persons who conducted the search, the dates or approximate dates on which the searches were carried out. This must be provided on or before 4:00 pm, October 3, 2024.
- 4) Plaintiffs awarded special costs of this application, payable by AKC in any event of the cause, not payable forthwith.

(the "Robinson Order")

- On October 1, 2024, the plaintiffs, and the defendants by counterclaim, provided their 6th amended list of documents.
- On October 3, 2024, Mr. Muirhead requested variation of the Robinson Order to permit late delivery of the affidavits. Mr. Cooper refused.
- On October 3, 2024, the affidavit of Scott Sheng, CEO of AKC, is provided verifying the AKC list of documents. AKC also provided their 3rd amended list of documents of approximately 800 documents. The affidavit of documents of Dr. Wang is also provided.
- On October 4, 2024, the defendant, AKC, provided their 4th amended list of documents of a further 92 documents. The Wang Defendants provided their 9th amended list of documents of 3,275 documents. This production contained approximately 2,000 emails from Ms. Zhao's Gmail account.
- On October 4, 2024, AKC wrote to the plaintiffs raising concerns that emails had not been listed by the plaintiffs.

- Also, on October 4, 2024, Mr. Muirhead advised the plaintiffs by letter that AKC had obtained documents from Mr. Chen that he had “copied from the AKC computer”, and which had been disclosed as part of AKC’s 3rd amended list of documents. Four of the documents—provided by Mr. Chen though created by A2Z, the personal holding company of Ms. Zhao—were:
  - 1) An invoice from AQM to Causeway Law Corporation regarding Market Consulting Services dated April 20, 2017 for \$25,000;
  - 2) A preliminary business plan dated December 16, 2017;
  - 3) The meeting minutes of A2Z between Ms. Zhao and Kenny Zhang dated January 31, 2018; and
  - 4) The meeting minutes of A2Z between Ms. Zhao and Kenny Zhang dated February 14, 2018.
- On October 6, 2024, the plaintiffs responded to AKC’s letter of October 4, 2024, stating that “your assertions that our clients have not produced relevant documents is without merit”.
- On October 7, 2024, AKC responded to the plaintiffs and pointed out that certain documents referred to in the October 4, 2024 letter included those from Ms. Zhao’s Gmail account and others were created by A2Z.
- On October 8, 2024, AKC applied for orders that Ms. Zhao, AQM and A2Z provide an amended list of documents and an affidavit verifying the list.
- On October 12, 2024, the plaintiffs opposed the application and attached affidavit #3 of Ms. Zhao. A summary of her affidavit as noted by AKC in their Notice of Application dated October 18, 2024, includes:
  - a) she has a Gmail account with the address irisqzhao@gmail.com (para. 12);
  - b) while at AKC, she was provided with an aikanggroup.com email account (para. 23);
  - c) during her time at AKC, she used her Gmail account for both personal and work-related emails (para. 13);

- d) her usual practice was to delete emails from her Gmail account after downloading and saving them locally onto the AKC laptop. She sometimes did this immediately after downloading and, at other times, in batches every few days (paras. 14-15);
- e) she provides two reasons for this practice: (1) to keep work emails separate from personal Gmail emails; and (2) to avoid paying for unnecessary storage charges (para. 16);
- f) she kept copies of some work emails in her Gmail account because she considered them important and wanted access to them when not using her laptop (para. 17);
- g) after reviewing the emails in her Gmail account for the period of September 1, 2015 to April 6, 2018, she identified approximately 500 emails, of which 265 relate in some way to work matters and are not purely personal (paras. 19-20);
- h) out of the 265 work-related emails, 70 have already been produced (para. 21); and
- i) she has provided her counsel with the remaining 195 possibly work-related emails from the same period, which are currently under review for relevancy (para. 22).

AKC also noted that Ms. Zhao's affidavit #3 was the first time she claimed to have deleted emails in her Gmail account.

- On October 17, 2024, contrary to their earlier denials, the plaintiffs provided their 7th amended list of documents listing approximately 69 Gmail documents.

[17] As further background, this protracted action is not the only one involving the principals. They are summarized in the plaintiff's October 15, 2024 Notice of Application this way:

62. There are, or have been, in addition to the present action, five other actions arising out [sic] the business dealings between Wang Dong and the plaintiffs. Four of those actions were commenced by Wang Dong, or companies he controls, against the plaintiffs.

63. Two actions (BCSC No. S-1812818 and BCSC No. S-194361) were tried at the same time over 14 days in May and June 2022 before Justice Marzari, with judgment against the Wang Parties. The only witnesses at trial were Wang Dong and Ms. Zhao. An appeal was brought by Wang Dong which was dismissed by the Court of Appeal with Reasons for Judgment given August 19, 2024 (2024 BCCA 299).



64. There are three other actions that Wang Dong has caused to be commenced against the plaintiffs, on which Wang Dong has not taken steps to pursue in years:

- (a) *Aikang Capital Inc. v. Qun Zhao, AQM et al*, BCSC No. S1812064 filed November 7, 2018 (by DS Lawyers for AKC). The claims advanced in this action are entirely repeated in the AKC counterclaim filed by Fasken for AKC on November 30, 2018 in the current proceeding;
- (b) *Aikang Capital Inc., Aikang GP (006) Management Ltd. et al v. Qun Zhao*, BCSC No. S-201100, filed February 3, 2020 (by DS Lawyers, whom Wang Dong deposes were his personal counsel during this time period). A Response was filed by Qun Zhao March 5, 2020, and then no further steps taken by Wang Dong ;
- (c) *AKYE and Wang Dong v. Qun Zhao*, BCSC S-229200, filed November 17, 2022 (by Blakes). An application to strike the claim as an abuse of process was filed by Qun Zhao March 7, 2023, set for hearing April 13, 2023, and then adjourned generally by consent.

[18] I will now turn to discussing the applications.

### **STRIKING A CLAIM**

[19] The plaintiffs seek to strike the response to civil claim as amended and counterclaim as amended.

[20] Rule 22-7(2), (5), and (6) permit the court to strike a response to civil claim, or make any other order it considers will further the object of the *Rules*, where a defendant has failed to comply with the *Rules*, produce documents, or abide by court orders.

[21] In *Barrie v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2021 BCCA 322 at para. 103, quoting *Rise & Shine Grocery & Gas Ltd. v. Novak*, 2016 BCCA 483 at paras. 35, 52–64, the Court of Appeal described orders to strike as:

- “draconian”;
- a “blunt tool, to be used sparingly”;
- only to be used in “the most egregious of cases”;
- “to be avoided where it reasonable to do so”;

- “not usually be granted until the [respondent] has been warned that result will follow upon further delay or obstruction”; and
- a last resort to be considered only after lesser sanctions are considered inappropriate.

[22] Even where an offending party does not have a lawful excuse—a precondition to an order striking pleadings—that alone will not necessarily compel that result. See *Kondori v. New Country Appliances Inc.*, 2017 BCCA 164.

[23] In short, striking a defence is reserved for the most severe cases, where the conduct is so egregious that the denial of the litigants a trial based on evidence is justified: *Muscroft v. Eurocopter S.A.*, 2003 BCCA 229 at para. 4. Obviously, these applications must be approached with caution.

[24] As for construing the orders, given the serious remedy sought, the terms should be viewed in context and in favour of the party at risk. Further, a legitimate disagreement over the interpretation of a court order cannot, in any event, justify the striking of a party’s pleadings.

[25] In support of this striking, the plaintiffs argue that the Wang Defendants have failed on a repeated and consistent basis to comply with their document production obligations, including complying with the court’s rules and terms of various orders in respect to the production of documents. The plaintiffs point to three acts of non-compliance with the *Rules*, related to orders of the court consented to by counsel for the defendants, and with the Robinson Order which taken together are sufficient to justify the relief sought.

[26] The plaintiffs argue that the affidavits provided are deficient and non-compliant with the *Rules* in how they deal with, or fail to deal with:

- a) production of documents from the AKC laptop, namely the delay since April 29, 2024, when AKC’s counsel had possession of the laptop and argued before the court the importance of having the opportunity to review and produce documents. There is an absence of an explanation of efforts made to

ensure the contents of the laptop were reviewed and listed prior to September 2024. The efforts described are only in reference to steps taken with the defendants' current counsel;

- b) production of Dr. Wang's emails including in July 2021, when Dr. Wang and AKYE were represented by current counsel, advised that no affidavit of documents had been produced by the defendants. There is an absence of an explanation as to why the 32,000 documents had not been reviewed prior to August 2024. Further, there is no explanation as to why Dr. Wang stated at his discovery in September 2019 that no relevant emails existed at his primary email account;
- c) production of other AKC documents including:
  - 1) documents discovered by AKC's current counsel on September 4, 2024, provided to AKC's previous counsel (Fasken) but not listed;
  - 2) a set of computer files located by AKC on September 23, 2024, that had not been previously reviewed by AKC's counsel;
  - 3) documents transferred from AKC's former counsel at Blakes to current counsel on May 1, 2024; and
  - 4) documents provided by Patrick Chen in early October 2024, for which there has been no explanation such as why they were not previously listed, why they had not been previously reviewed, or where they were sourced.

[27] The defendants argue that there has been no failure. The Wang Defendants acknowledge that they did not produce documents relevant to the claim since December 2019, the date of their 5th amended list of documents, until delivery of documents listed in their 7th amended list of documents in September 2024. However, in acknowledging this, they also note that since re-appointment of their present counsel in May 2024 (previously acting for the Wang Defendants until June

2022), they have moved forward actively and cooperatively with plaintiffs' counsel regarding document production. They describe in some detail the steps taken to provide further lists of documents; communications with plaintiffs' counsel; requests for agreement on search terms for review of documents in the laptop used by Ms. Zhao while employed by AKC; steps taken to avoid breach of Ms. Zhao's privilege rights in reviewing documents uncovered in the laptop; their consent to production orders; the delivery of additional lists of documents with further descriptions as requested by the plaintiffs' counsel; and, affidavits verifying their lists.

[28] As a result of the Robinson Order, Dr. Wang delivered as required an affidavit of documents, including statements regarding the areas specified in the order. He also stated that a 9th list of documents was expected due to new keyword searches executed in late September. In early October, the list was delivered and on request of plaintiff's counsel, an affirmative "load file" format of the list was provided. The Wang Defendants submit that they have acted reasonably and complied with the rules and existing orders.

[29] The defendants argue that the Robinson Order does not require the explanations identified by the plaintiffs as being absent. Rather, the order requires details as to what has been done. It is submitted that the level of detail sought by the plaintiff would require the defendants to undoubtedly disclose privileged information.

[30] The Wang Defendants also bring into the mix the conduct of Ms. Zhao in failing to disclose emails in her Gmail account. They submit that Ms. Zhao knew she conducted business while acting as AKC's CEO using an account operated by the Google™ email service, known as "Gmail". She knew she had relevant emails in her Gmail account. Even if she did not have relevant emails in her possession or control after AKC seized the AKC Laptop, she kept emails in the Gmail service and had access to them. More importantly, it is argued, she never disclosed the existence of these documents until the eve of trial. Her production of an amended list of documents including emails she still has in her Gmail account, it is argued, proves

she knew she possessed documents relevant to this action she did not disclose to all other parties in this Action. They note Rule 7-1 requires the plaintiffs to disclose relevant documents even if they are no longer in their possession and that the plaintiffs did not do so, which is a failure that continued for years until the eve of trial.

[31] The defendants also bring attention to the fact that the trial has been adjourned twice because of the plaintiffs' conduct. The first adjournment was because the plaintiffs unilaterally set the trial date and then failed to serve the notice of trial for ten months, in breach of the *Rules*. The second adjournment resulted from the plaintiffs' delay in filing their application to amend their pleadings and seeking substantive amendments shortly before the second trial date.

[32] It is further submitted that even if a breach has been found, there is no evidence indicating that non-compliance with court orders will continue; and, further, that the striking of pleadings sought by the plaintiff is not proportionate, and that this draconian response is not justified in the circumstances. If some sanction is to be imposed, a lesser form should be considered.

[33] The obligation to disclose and produce documents required under the *Rules* is a cornerstone to the truth-seeking-function in civil litigation. The late disclosure of documents reveals a lack of diligence on the part of the defendants as well as it seems by the plaintiffs.

[34] A large part of the plaintiff's complaints regarding disclosure of documents was addressed before Robinson A.J. on September 26, 2024. Having read his ruling, it appears the deficiencies under the consent order and rules were addressed by the order that he issued. I will note that the Wang Defendants were found to have provided their list of documents and was "in compliance or in accordance with discussions with counsel for the plaintiffs, it is evident that the [Wang Defendants] have endeavoured to address the issues that arise in determining the extent to which the documents comply with the consent order". The Associate Judge stated that the Wang Defendants "have complied with and fulfilled the expectations of the plaintiffs and indeed the expectations of this court". The Associate Judge, however,

ordered that an affidavit be produced verifying their list of documents, the terms of which were set out above.

[35] I note that special costs had been ordered against AKC in the Robinson Order due to the “cavalier and casual approach” of Dr. Wang. However, the efforts by current defendants’ counsel to meet the disclosure obligations and the cooperative steps taken and offered to plaintiffs’ counsel shed some positive light to the circumstances. While the late disclosure of documents from the defendants post-Robinson Order is concerning particularly Dr. Wang’s emails, it cannot be ignored that Ms. Zhao failed to list the existence of documents that had been in and are in her possession, and which played some role in the delay of which she complains. The early steps taken by Ms. Zhao’s counsel to secure and hold her work laptop certainly signals the existence or at least highly likely existence of documents that would be relate to the issues. Additionally, there is the very late disclosure of documents from Ms. Zhao’s Gmail account, some of which appear to assist the counterclaim.

[36] As mentioned, the parties have been engaged in extensive litigation on several fronts, beyond the present action. There has been, in large measure, clear engagement by the opposing sides.

[37] At this point, amended lists of documents required under the Consent Orders and the Robinson Order, as well as the affidavits verifying the documents (October 3), have been delivered. The latest amended list #9 has been as well.

[38] In respect of the affidavits produced, I am satisfied that the requirements have been met. The explanations which the plaintiffs argue have not been provided were not specified in the Robinson Order.

[39] It appears that the document production is at a point which is complete and thus permits the case to advance.

[40] I am of the view that any deficiency here in production or explanation (if at all) is not of the nature warranting the striking of the pleadings. Further, as has been

noted, there is normally a warning given prior to the court taking that drastic step. That warning was not given. If relief were to be given, it would in costs.

[41] While I appreciate the frustrations of plaintiffs' counsel, their client has also contributed in some way to the difficulties. The interests of justice favour this case continuing to be decided on the merits; however, should a subsequent deficiency of significance arise, an application to strike will be entertained. Accordingly, the application is dismissed.

[42] Hopefully, with the completion of the further process which I deal with below, the trial proper will be able to get underway within a reasonable period. Unfortunately, the trial dates presently set will have passed and new dates will have to be obtained.

[43] I turn now to the question of waiver of privilege.

**WAIVER OF PRIVILEGE**

[44] The plaintiffs seek a declaration that Dr. Wang waived privilege.

[45] A party claiming that another party has waived their privilege must meet a strict test: *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC) [S. & K.]. Under this test, they must show that those possessing the privilege “knows of the existence of the privilege”, and that they “voluntarily evinces an intention to waive that privilege”, but it may “also occur in the absence of an intention to waive, where fairness and consistency so require”: *S. & K.* at para. 6.

[46] It has also been found that a party may impliedly waive privilege where the privilege holder attempts to use, and simultaneously “shelter behind”, privileged documents. In such cases, fairness and consistency require production of the materials so that the privilege holder may not use the privilege as both a sword to explain a position as well as a shield to prevent the other party from testing that explanation: *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at paras. 140–142.

[47] Justice Harris writes in *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at paras. 22–26 that for *implied* waiver of solicitor-client privilege to be found, the following factors must be established:

- a) the party asserting privilege has “put its state of mind” in issue with respect to an issue advanced by a party in the litigation;
- b) the party asserting privilege has obtained legal advice about the topic at issue; and
- c) the party asserting privilege must voluntarily inject into the litigation its understanding of its legal position or relies on legal advice to justify its conduct in such a way that fairness and consistency require disclosure.

[48] The plaintiffs ask the Court to make the following order:

A declaration that in his Affidavit #6, dated October 3, 2024 Wang Dong has waived privilege over instructions to and legal advice from Blakes Cassells Graydon LLP (“Blakes”), Shields Harney, and Fasken for the entirety of their retainers, and from Ascension Law for the period of its retainer between in or around June 2020 to June 22, 2022, with respect to document production and disclosure of Wang Dong, AKYE, and AKC...

[49] They claim that in Dr. Wang’s Affidavit #6 (the “Wang Affidavit”), he implicitly waived privilege over his instructions to, and legal advice from, his various counsel over a period from June 2020 to June 22, 2022. Specifically, they point to a limited comment from paragraph 11 of the Wang Affidavit, that “the events of this litigation span many years”, and that “I [Dr. Wang] have searched for, and instructed others to search for, documents in the possession of myself or AKYE and provided those to lawyers”.

[50] The plaintiffs rely on two cases in their October 15, 2024 application: *Soprema* at paras. 20–26, and *Huang* at paras. 140–143. In applying *Soprema*, the plaintiffs argue that Dr. Wang has failed to comply with the *Rules* regarding his document production. They say that, by failing to address these matters while also asserting compliance, Dr. Wang has put into issue the instructions he gave to his



counsel for document disclosure. For the second element of the test, they say that Dr. Wang injected his state of mind with respect to the legal advice received by describing the fact that his counsel made certain decisions with the documents. On the third and final element, they claim that in the Wang Affidavit, Dr. Wang is simultaneously using and ‘shielding behind’ the legal advice.

[51] AKC opposes the plaintiffs’ request for a declaration on implied waiver for three reasons:

- a) First, that this matter is not a rare case where it may be appropriate to make a declaration that privilege has been waived;
- b) Second, that Dr. Wang cannot waive AKC’s privilege; and
- c) Third, that the test for implied waiver has not been met.

They begin their submissions by articulating various principles about solicitor-client privilege, including the fundamental nature of this privilege, as found in the case law: *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at para. 55, and *Morvay v. Warke*, 2012 BCSC 1696 at para. 41.

[52] Turning to their first argument against the declaration, AKC says that although the court has the inherent jurisdiction to make the declaration sought, it is only appropriate to do so in rare circumstances: *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263 at paras. 33–36. This case is not such a circumstance: the broad declaration of waiver may potentially cover documents not closely connected to the contents of the Wang Affidavit, nor is the court able to assess whether fairness and consistency requires this broad waiver without considering the documents over which privilege would be waived.

[53] On their second argument, AKC submits that, pursuant to the principle that solicitor-client privilege belongs to the client and may only be waived by the client, the Wang Affidavit was not filed on behalf of, nor approved or authorized by, AKC—it

was only on behalf of Dr. Wang in his personal capacity and on behalf of AKYE: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 356.

[54] AKC relies on this principle for their third and final argument: the test for implied waiver is not met. Specifically, they refer to this point for the “voluntary” part of the test in *Soprema*, which was summarized in *Mickelson v. Borden Ladner Gervais LLP*, 2017 BCSC 1584 at para. 18. On the voluntariness aspect, they also submit that Dr. Wang’s affidavit was completed in compliance with the Robinson Order, which is not a voluntary action. Moreover, they add, the Wang Affidavit does not mention his state of mind, legal advice received, or reliance on legal advice.

[55] On the third *Soprema* element, AKC says that the extent of a waiver of privilege is a question of fact, to be determined based on information voluntarily disclosed, and its relevance to matters at issue in the litigation: *McDermott v. McDermott*, 2013 BCSC 534 at para. 117, and *W. Johnston Equities Ltd. v. Allen*, 2012 BCSC 414 at para. 29. Given that the actions of AKC’s counsel was done in accordance with an agreement between the parties, as well as disclosed to counsel for the plaintiffs regarding the laptop to be sent to a forensic expert for extraction, the information is not privileged. Therefore, AKC submits in their Application Response that fairness and consistency do not make it “absolutely necessary” to require disclosure, referencing *Soprema* at para. 50, and *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at paras. 14–15.

[56] The Wang Defendants also oppose the plaintiffs’ request for a declaration on implied waiver. They, too, start their submissions by pointing to jurisprudence on the necessity of solicitor-client privilege, including *H.M.B. Holdings*, *Soprema*, and *Goodis*. In addition, they provide the strict test for waiver of privilege, articulated in *S. & K.*, as well as *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 on the issue of express waiver, and *Peak Products Manufacturing Inc. v. Gross*, 2023 BCCA 214 on the issue of implied waiver.

[57] They submit that Dr. Wang neither expressly nor impliedly waived privilege. They note that the plaintiffs are alleging that they, the Wang Defendants, have relied

on legal advice as an element of their defence. The Wang Defendants refer to *Rogers v. Hunter*, 1981 CanLII 710 (BC SC) on this point.

[58] Moving to the *Soprema* test, the Wang Defendants dispute the claim that Dr. Wang voluntarily waived privilege, as he was following the Robinson Order. Like AKC, they say that compliance with a court order does not equate to voluntarily waiving privilege, for which they rely upon the McLachlin and Taylor text, *British Columbia Practice*, as well as *Gault Estate (Re)*, 2016 ABQB 53 at para. 27, and *1397225 Ontario Limited v. 0805361 B.C. Ltd.*, 2017 BCSC 1830 at para. 54. Furthermore, the Wang Affidavit did not include instructions given to counsel, nor any legal advice received.

[59] The Wang Defendants also argue that *Huang*, a case relied upon by the plaintiffs, does not support the plaintiffs' position. They note that the scope of *Huang* was limited in *Peak Products* at paras. 61–62, where the privilege holder at issue was not found to have relied upon solicitor-client privilege as both a sword and shield. In pointing to this case, the Wang Defendants argue that the situation at hand is similar. They also say that the plaintiffs have failed to establish any prejudice, aside for the adjournment of trial.

[60] I am not persuaded that a waiver of privilege has occurred. The specific statements of Dr. Wang in affidavit #6 do not amount to an implied waiver. The statements were made pursuant to the Robinson Order, and in that regard, not voluntary. As well, Dr. Wang does not rely on legal advice privilege to support an assertion in which the affirmation maintains a claim or allegation against the plaintiffs. The Wang Defendants refer to their understanding of what their agents did in producing the list of documents to follow a court order to explain the details of production. In this regard, I agree with the submission of the Wang Defendants that:

- a) In their October 15, 2024 Notice of Application, the plaintiffs repeatedly claim the Wang Defendants have provided “no explanation” (sixteen instances of the phrase) or are “silent” (nine instances of the word) about the lack of

instructions from the Wang Defendants gave, or should have given, to their lawyers. Some examples are:

Both the Wang Affidavit and the Sheng Affidavit are silent as to why neither Wang Dong nor AKC instructed Fasken to review, list and produce the AKC Laptop documents on the mirror hard drive produced by TCS Forensics....

...

There is no explanation in the Wang Affidavit or the Sheng Affidavit for the combined failure of Wang Dong, AKYE and AKC to cause any of Fasken, Blakes, or Ascension Law to list and produce the relevant documents on the AKC Laptop in the approximately 3 years that Fasken had possession of the laptop between 29 April 2021 and July 29, 2024....

- b) All these observations critique the Wang Defendants' choice not to reveal advice or instructions exchanged between Dr. Wang and his counsel, the content of conversations protected by privilege. Notably, the plaintiffs have not alleged that the Wang Defendants have not disclosed documents. Instead, the plaintiffs' essential complaint is that the Wang Defendants have disclosed the emails and documents in the 8th and 9th amended lists of documents late. They seek an order waiving privilege to obtain some explanation for the delay in his production. However, the plaintiffs do not allege Dr. Wang explained the delay in disclosing documents as one arising because he followed legal advice. Dr. Wang never deposed to that fact. Instead, at worse, Dr. Wang consistently preserved his privilege over communications he had with his counsel over the years.
- c) Any unexplained delay in production without evidence of prejudice of the plaintiffs' ability to produce their case leaves open a critique that there was a delay. Such a finding then invites the plaintiffs to pose how this delayed disclosure has prejudiced their ability to prosecute their action, which they have elected not to do. The court should weigh any prejudice the plaintiffs have suffered against the prejudice the Wang Defendants have suffered because of the plaintiffs' failure to disclose the existence of relevant emails in Ms. Zhao's Gmail account or which the plaintiffs knew were on the AKC

Laptop. The election by the Wang Defendants to preserve their privilege over legal advice, while leaving the delay of producing Ms. Zhao's emails unexplained, does not justify a measure as drastic as a declaration that the Wang Defendants have waived privilege or that the court should strike all defences.

[61] The waiver of privilege declaration is denied.

**LEAVE TO AMEND PLEADINGS**

[62] AKC seeks leave to file an amended counterclaim and amended response to civil claim. The forms as attached to AKC's Notice of Application are consented to by the plaintiffs and defendants by counterclaim, as well as the Wang Defendants. As a result, leave is granted.

**AMENDMENT OF LODs AND PRODUCTION OF DOCUMENTS**

[63] AKC seeks an order that the plaintiffs and defendants by counterclaim amend their list of documents to include various unidentified documents. The materials indicate that the plaintiffs since AKC's application have provided their 7th amended list of documents. As a result, it appears the order is not required.

**AFFIDAVIT VERIFYING A LIST OF DOCUMENTS**

[64] Given the very late disclosure of the parties, and the background provided, including the conflicting information regarding disclosure between Ms. Zhao's counsel to AKC's counsel and her subsequent disclosure of additional documents, all parties are required to provide an affidavit verifying their respective most recently provided list of documents as complete, and the basis upon which they verify their list. If a party is unable to do so, then the matter is to be brought before the court.

**CONTINUATION OF EXAMINATION FOR DISCOVERY**

[65] Given the recent disclosure of documents by the plaintiffs and defendants, and taking into consideration proportionality and the complexity of this case, the leave to AKC to amend its pleadings, particularly in relation to the emergence of

documentation that indicates potentially unauthorized activities of Ms. Zhao inimical to the defendants, the continuation is granted. Similarly, a continuation is granted to the plaintiffs.

[66] In terms of duration, it is my understanding that the discoveries have been conducted through an interpreter. Applying a rule of thumb that this would tend to roughly double the time normally required and recognizing the factors identified warranting continuation, I authorize a further three hours in total for all of the defendants to examine the plaintiffs and similarly so for the plaintiffs to examine the defendants.

**CROSS-EXAMINATION**

[67] The plaintiffs and AKC seek to cross-examine the other on the affidavits tendered.

[68] Cross-examinations are not a matter of right in British Columbia, though it may be ordered by the courts pursuant to Rule 21-4(a): *Derencinovic v. 7 West Homes Ltd.*, 2021 BCSC 182 at para. 5.

[69] In *Stephens v. Altria Group, Inc.*, 2021 BCCA 396 at para. 5, the Court states that three factors must be considered when determining whether cross-examination on affidavits is appropriate:

- a) whether there are material facts in issue;
- b) whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and
- c) whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.

[70] The plaintiffs seek to cross-examine Dr. Wang and Mr. Sheng on their affidavits #3 and #6, in furtherance of the application to strike, should the court not strike the pleadings in this initial phase. The plaintiff's application is largely premised

on the assertion that privilege has been waived. Having found earlier that no such waiver occurred, and my view that the state of disclosure by the defendants has been completed and the circumstances do not warrant the striking of pleadings sought, the application for cross-examination is denied. However, given that there have been further documents produced since then, it would be appropriate to allow further examination for discovery of Dr. Wang regarding those documents and the circumstances leading to their discovery on the part of the defendants.

[71] AKC seeks to cross-examine Ms. Zhao on her third affidavit. AKC argues two main reasons: (1) resolving the core issue of whether the plaintiffs have fulfilled their disclosure obligations under the *Rules*; and (2) assessing Ms. Zhao's credibility.

AKC submits that:

140. The evidence indicated that Ms. Zhao has withheld a substantial number of emails from Gmail account, selectively disclosed only those emails that support her position, and fabricated explanations for failing to disclose additional relevant emails.

141. There are also several unanswered questions raised by the plaintiff's affidavit. Cross examination is necessary to explore, for example,

- a) How were the emails saved "locally" – was there an automatic process or did she manually download each email?
- b) She admits to keeping certain work emails in Gmail for easy access when away from her laptop, yet simultaneously deleted others – how did she decide what was important to keep?
- c) What happened to the deleted emails – were they permanently deleted, or could they be recovered from backups or other devices?
- d) What efforts has she made to recover deleted emails?
- e) Why did she save both personal and work emails together on the AKC laptop, and how does she reconcile this with her evidence in paragraph 16 that her practice was to keep work emails separate from personal emails?
- f) Why did she not review her email account earlier in the litigation, or why was her review so inadequate?
- g) Why did she not disclose on her list of documents that she had deleted relevant emails?
- h) Why did she consent to an order requiring her to produce correspondence, likely including emails she had deleted, without disclosing her deletion of emails?

- i) Why did she not disclose that she had deleted emails when responding to examination for discover requires that required her to produce emails she had deleted?
- j) What records did Ms. Zhao review prior to advising her counsel that she did not have copies of records referred to in AKC's counsel's letter? Was this advice truthful?
- k) How is it the case that A2Z no longer has copies of some of its corporate records relevant to this action?
- l) How is it the case that AQM no longer has copies of some of its corporate records relevant to this action?

[72] These questions can be asked in the continuation of the examination that I have authorized.

**CONCLUSION**

[73] In sum:

- a) the plaintiffs' application to strike is denied;
- b) the plaintiffs' application for a declaration that Dr. Wang waived privilege is denied;
- c) the plaintiffs' application to cross-examine Dr. Wang on his affidavit #6 is denied;
- d) the defendant AKC's application to file an amended counterclaim and amended response to civil claim is approved;
- e) the defendant AKC's application that Ms. Zhao provide an affidavit verifying the plaintiffs' and AKC's list of documents is approved. Similarly, the same is required of the defendants;
- f) the defendant AKC's application for the continuation of the examination for discovery of Ms. Zhao in her own capacity and as a representative of AQM and AKC is granted, including the questions proposed for cross-examination above. AKC is granted a further three hours for such examination. Similarly,



the plaintiffs will be allowed further examination for discovery of the defendants; and

- g) the question of costs regarding the present applications is to be addressed following trial.

“Masuhara J.”